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Nos. 91-155 & 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,
vs.

WALTER LEE, Superintendent of Port Authority Police,
Respondent and Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May the solicitation and receipt of contributions be prohibited from the public concourses of airports?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation on behalf of victims of crime and the law-abiding public.

In Question 3 of the Petition for Writ of Certiorari, petitioner states the issue as involving "speech that, at worst, might cause [travelers] momentary delay." In reality, the worst is *far* worse. The *conduct* which petitioners seek to engage in concurrently with their speech creates a situation fraught with potential for fraud, duress, and victimization of the helpless. These concerns are not based on idle speculation. They are based on the judicial-

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1. CJLF has received written consent of the parties to file this brief.

ly determined facts from prior litigation involving the petitioner.

The cumbersome machinery of the criminal justice system is suited for dealing with major crime. It is dismally ineffective in dealing with the widespread petty crime that plagues our society today. Such crime is a major factor in the growing, malignant cancer of decay and disorder. See generally Leo, *Fighting for Our Public Spaces*, U. S. News & World Report, Feb. 3, 1992, at 18; Wilson and Kelling, *Making Neighborhoods Safe*, Atlantic Monthly, Feb. 1989, at 46; Wilson and Kelling, *Broken Windows: The Police and Neighborhood Safety*, Atlantic Monthly, March 1982, at 29.

A decision that government is powerless to regulate in-person solicitation for the immediate payment of money would be detrimental to the rights of law-abiding persons which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

Petitioner, the International Society for Krishna Consciousness, Inc. ("Krishna Society"), seeks to engage in activities it calls *sankirtan* in the major New York airports. Those airports are operated by the Port Authority of New York and New Jersey. Respondent is the late Walter Lee, who was superintendent of police for the Port Authority. As of this writing a new superintendent has not yet been substituted as a party.

Sankirtan "consists of 'going into public places, disseminating religious literature and soliciting funds to support the religion.' While the distribution or sale of religious literature is a major part of the ritual, its primary purpose appears to be fundraising." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F. 2d 576, 577 (CA2 1991). The Krishna Society and *sankirtan* are

described in detail in *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147, 151-154 (N.D.N.Y. 1980), rev'd on other grounds, 650 F. 2d 430 (CA2 1981). *Barber* notes that while *sankirtan* traditionally depended on "true speech and gentle speech," the theory and practice in the modern American branch of the religion are dramatically different. See 506 F. Supp., at 152-153.

The Port Authority promulgated a regulation forbidding both "sale or distribution of . . . written material" and the "solicitation and receipt of funds" inside the airport "if conducted by a person to or with passers-by in a continuous or repetitive manner." 925 F. 2d, at 578-579. The Port Authority does not seek to limit either activity on the sidewalk outside the airport. *Id.*, at 578, n. 2. The District Court struck down the regulation as to both the literature distribution and the solicitation limits.

The Court of Appeals reversed in part, upholding the ban on solicitation. The majority found the case indistinguishable from *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990), where this Court upheld a similar ban on post office property. 925 F. 2d, at 582. However, the Court of Appeals affirmed the judgment insofar as it struck down the ban on distribution of literature. *Ibid.*

On the petition for certiorari, case 91-155, the Krishna Society seeks to strike down the solicitation regulation. On the cross-petition, case 91-339, the Port Authority seeks to reinstate the literature distribution regulation. In this Brief *Amicus Curiae*, CJLF will only address the solicitation issue in the petition, *i.e.* case 91-155.

SUMMARY OF ARGUMENT

The concurring opinion in *United States* v. *Kokinda* stated that the government could prohibit personal

solicitation for immediate payment of money in the circumstances of that case, regardless of whether the location was a public forum. Whether this is correct is an important question that needs to be answered. The Court should therefore address the solicitation issue first. The public forum question can and should be addressed to resolve the literature distribution question raised by the cross-petition.

The statement that solicitation for a religious cause is "fully protected speech" is an oversimplification. A careful analysis of precedents reveals that this sweeping generalization is subject to important qualifications. First, receipt of money or subscriptions is conduct, subject to regulation. Second, solicitation is subject to reasonable time, place, and manner restrictions, the same as any other speech.

The government has a substantial interest in regulating personal solicitation for immediate payment. Past cases show that such solicitation creates a situation fraught with potential for fraud, duress, and thievery, beyond the ability of the criminal law to effectively check.

The solicitation regulation deals with the manner of combined speech and conduct. It is valid if it passes either the *O'Brien* test or the time, place, and manner test. It passes both. It is nondiscriminatory, content-neutral, and leaves open ample alternatives for conveying the Krishna Society's message.

ARGUMENT

I. The Court should address the solicitation question before the public forum question.

United States v. *Kokinda*, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) upheld a ban on solicitation on the grounds of a post office without a clear resolution of the question

of whether the grounds were a public forum. The *Kokinda* plurality based its decision on the conclusion that the post office and its grounds were a non-public forum. 111 L. Ed. 2d, at 584, 110 S. Ct., at 3121. However, the fifth vote was based on the assertion that "personal solicitation on postal property for the immediate payment of money" can be prohibited as a time, place, and manner restriction, regardless of whether the property is a public forum. 111 L. Ed. 2d, at 589, 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment).

Amicus CJLF respectfully submits that the Court should address Justice Kennedy's position in *Kokinda* first. The Court can then proceed to the public forum issue to answer the literature distribution question raised by the cross-petition. This case presents an opportunity to clear up a half century of rampant confusion regarding solicitation, and that opportunity should be not be passed up.

In 1943, this Court decided a trilogy of cases involving the activities of Jehovah's Witnesses. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Douglas* v. *Jeannette*, 319 U. S. 157. Justice Jackson, joined by Justice Frankfurter, wrote an opinion in *Douglas* concurring in the result in that case and dissenting in *Murdock* and *Martin*. After reviewing the record of the Witnesses' practices and the Court's decisions in *Murdock* and *Martin*, he notes that "both opinions suggest that there are evils in this conduct that a municipality may do something about. But neither identifies it, nor lays down any workable guide in so doing." 319 U. S., at 177.

Such a workable guide is necessary, Justice Jackson concludes. "[W]e must do our utmost to make clear and easily understandable the reason for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition. ¶I think the majority has failed in this duty." *Id.*, at 182.

Justice Jackson's warning proved correct. The field remains confused. In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), the authors of *Murdock* and *Martin* stated that those cases had been overruled. *Id.*, at 649-650 (Black, J., dissenting, joined by Douglas, J.). *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980) said they had not. In *Riley* v. *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 796 (1988), the majority proclaims broadly that solicitation is "fully protected speech." Yet in *Kokinda*, *supra*, the plurality implies and the concurrence holds that personal solicitation for immediate payment is subject to substantially greater regulation than pure advocacy of ideas.

As we will show in detail below, bans on solicitation in general are different from prohibitions of the kind of face-to-face solicitation for immediate payment of money engaged in by the Krishna Society. Yet the lack of clear, unequivocal authority for the distinction causes confusion. Some district courts have applied broad language in some of the cases to contexts far removed from the kinds of activities involved in those cases. See, *e.g.*, *Young* v. *New York City Transit Auth.*, 729 F. Supp. 341, 345 (S.D.N.Y. 1990), rev'd, 903 F. 2d 146 (CA2 1990), cert. denied, 111 L. Ed. 2d 516, 111 S. Ct. 516 (panhandling in subway); *Blair* v. *Shanahan*, 775 F. Supp. 1315, 1318 (N.D. Cal. 1991) (panhandlers accosting people on streets).

To clear up this confusion, therefore, *amicus* respectfully requests that this Court address the question of whether a state can prohibit the personal solicitation for immediate payment of money, regardless of whether the place of solicitation is a public forum.

II. Solicitation is not exempt from regulation.

"Our prior cases teach that the solicitation of charitable contributions is protected speech," the majority stated in *Riley* v. *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 789 (1988). Like many sweeping characterizations, this one glosses over subtle but important distinctions. "By their very vastness, the themes to be translated into law lend themselves too readily to the innocent deceptions of rhetoric." *Poulos* v. *New Hampshire*, 345 U. S. 395, 415 (1953) (Frankfurter, J., concurring in the result).

The word "solicitation" sweeps in a wide variety of speech and conduct. Whether a particular form of solicitation is protected is a question which cannot be answered simply by pigeonholing it as "charitable solicitation." The statement "Give to my widows' and orphans' fund or I'll bash your face in" is not protected speech.

Schaumburg v. *Citizens for a Better Environment*, 444 U. S. 620 (1980) is the case normally cited for the proposition that charitable solicitation is fully protected. *Schaumburg* is based on a discussion of a long line of cases. See *id.*, at 628-632. These cases do indeed support the *Schaumburg* decision, but they do not support the more extravagant extrapolations that have been made from that decision. A review of these cases is necessary.

A. Pre-Schaumburg Cases.

In *Schneider* v. *State*, 308 U. S. 147 (1939),[2] the Court struck down an ordinance requiring a permit for any house-to-house canvassing. In that case, the Jehovah's Witnesses went house to house, distributing literature and showing a card which asked for a small contribution to support the distribution effort. *Id.*, at 158. The ordinance made no distinction between solicitation and distribution of literature. *Id.*, at 157. "It bans unlicensed *communication* of any views or the *advocacy* of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what litera-

2. Sometimes cited as *Schneider* v. *Irvington*.

ture may be distributed from house to house and who may distribute it." *Id.*, at 163 (emphasis added).

The ordinance was struck down under *Lovell* v. *Griffin*, 303 U. S. 444 (1938), which had invalidated a sweeping ban on all literature distribution. 308 U. S., at 164. The censorship potential of the ordinance, permitting some to solicit while others were banned, was particularly obnoxious. *Ibid.* The Court was careful to note, however, that "reasonable hours" and "other features of such activities . . . may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." *Id.*, at 165. *Schneider* does not stand for the proposition that in-person solicitation and receipt of money cannot be prohibited. That aspect of Schneider's conduct was not the basis of the permit requirement.

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) is another prior restraint case, involving a license requirement for solicitation.[3] The statute empowered state officials to decide which causes were "bona fide object[s] of charity" and which were not. Only the approved charities received the required certificate. *Id.*, at 302.

This power of censorship vested in state officials rendered the statute unconstitutional. *Id.*, at 305. The *Cantwell* Court was careful to note, however, that solicitation for religious causes was not exempt from "general and non-discriminatory legislation." *Id.*, at 304. "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose." *Id.*, at 305.

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3. *Cantwell* is more famous for its holding reversing defendant's other conviction for breach of the peace. The latter conviction involves the degree to which we must tolerate intolerant expression, an issue before this Court in *In re R.A.V.*, No. 90-7675.

In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), a license requirement for holding a parade was upheld. The state court had construed the statute to require the authorities to issue the license conditioned only on reasonable time, place, and manner restrictions. *Id.*, at 575-576. Cases involving blanket bans on expression or vesting standardless discretion in the licensing officials were distinguished. *Id.*, at 577-578.

Jamison v. *Texas*, 318 U. S. 413 (1943) involved distribution of handbills. The handbills publicized a meeting to be held later and also included an offer to deliver books in return for a small donation. Jamison distributed her handbills in an orderly and quiet manner. The books were not sold on the street, but would have been delivered later. The books cost Jamison more than the donation she requested. *Id.*, at 414-415.

The ordinance was struck down on the authority of *Lovell*, *Schneider*, and *Cantwell*. Jamison's "clearly religious activity" could not be prohibited "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." *Id.*, at 417.

The *Jamison* Court appears to have been convinced that the defendant was engaged primarily in communicating ideas, and that the fund-raising aspect of her activity was merely incidental. The same is true of the case which comes closest to supporting the Krishna Society's position: *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

Murdock involved a flat license tax on solicitation for orders for goods of any kind. *Id.*, at 106. The defendants were, once again, Jehovah's Witnesses distributing their literature. Whether they were selling it or merely giving it away and requesting donations was unclear. See *id.*, at 107. Justice Douglas, writing for the Court, begins with a

long song of praise for the "colporteur,"[4] but then defines the "single issue" narrowly: "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." *Id.*, at 110.

Murdock then distinguishes religious activity from "purely commercial." *Ibid.* In doing so, the Court takes pains to stress that the fund-raising portion of the activity was merely collateral, and that preaching and publicizing the doctrine was the main object. *Id.*, at 112.

It is clear from the discussion in *Murdock* that the "purely commercial" does not include the press. The fact that Thomas Paine's pamphlets were sold is cited to support the argument that sale does not equal "purely commercial" activity. *Id.*, at 111. Freedom of speech, press, and religion are cited together as not being limited "to those who can pay their own way." *Ibid.* Religious groups and the press are again mentioned together as not being free from all taxation. *Id.*, at 112.

The *Murdock* holding is, therefore, not based on any distinction between soliciting donations for religious causes and selling newspapers. It is instead based on the oppressive nature of the flat license tax. Even after going to considerable lengths to characterize the activity as non-commercial, *Murdock* relies on Commerce Clause precedent for the onerous nature of this tax. See *id.*, at 113.

The heart of *Murdock* is this: The tax "is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties *of press* and religion and inevitably tends to suppress their exercise." *Id.*, at 114 (emphasis

4. "A peddler of devotional literature." *American Heritage Dictionary* 294 (2d Coll. ed. 1985).

added). Read broadly, this passage may be taken to mean that there is a constitutional right to solicit in person for the immediate sale of printed matter or for a donation for a religious cause. If that is what *Murdock* means, it has long since been overruled, as we will show below. Read narrowly, *Murdock* simply means that the flat license tax is an oppressive burden on religion and the press, just as it is on interstate commerce. If that is what *Murdock* means, it is still good law, but it has no application to this case.

Martin v. *Struthers*, 319 U. S. 141 (1943), yet another Jehovah's Witnesses case, was decided the same day as *Murdock*. The ordinance in question prohibited persons distributing literature door to door from ringing the doorbell or knocking. *Id.*, at 142. Citing *Lovell*, *Schneider*, and *Cantwell*, the Court struck down this ordinance as a violation of freedom of speech and press, not religion. *Id.*, at 143.

Thomas v. *Collins*, 323 U. S. 516 (1945) indicated that the issue of solicitation as distinct from pure advocacy remained open, despite the broad language of *Murdock*. In *Thomas*, a labor union leader gave a speech in Texas without the required organizer's card for labor solicitation. He invited the crowd generally to join the union and also singled out one member of the audience for an individual appeal to join. *Id.*, at 522-523.

The Court decided in favor of the labor leader. However, it took pains to note that he did not receive or solicit any funds, *id.*, at 525, and that under the procedural posture of the case the solicitation of the individual could not be separately considered, *id.*, at 528.

A permit cannot be required of one who seeks to make a speech "to rally support for any social, business, religious or political cause." *Id.*, at 540. "Once the speaker goes further, however, and engages in *conduct* which amounts to more than the right of free discussion

comprehends, *as when he undertakes the collection of funds* or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed." *Ibid.* (emphasis added). Conduct is different from speech, and collection of funds is conduct.

This brings us to *Breard* v. *Alexandria*, 341 U. S. 622 (1951). *Breard*, like the present case, involved a flat prohibition on in-person solicitation. The ordinance in *Breard* prohibited door-to-door sales or solicitation of orders. *Id.*, at 624-625.[5] After rejecting due process and interstate commerce challenges, *id.*, at 629-641, the Court turned to the First Amendment question.

Breard was in the business of selling magazine subscriptions. *Id.*, at 624. Therefore, he had a First Amendment argument. "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." *Id.*, at 641. Breard was in the same category as the Jehovah's Witnesses and different from the Fuller Brush Company. The Court agreed "that the fact that periodicals are sold does not put them beyond the protection of the First Amendment." *Id.*, at 642. However, the selling "brings into the transaction a commercial feature." *Ibid.*

Breard is consistent with a narrow reading of *Murdock*, but not a broad reading. *Murdock* had held that the Witnesses' activities were not rendered *purely* commercial by the fact that the literature was sold, 319 U. S., at 111, but recognized "that religious groups and the press are [not] free from all financial burdens of government," *id.*, at 112. *Breard* similarly recognizes that publications are still entitled to First Amendment protection, even though they are sold for a profit, but that the protection is not

5. Such enactments are commonly called "Green River" ordinances after *Green River* v. *Fuller Brush Co.*, 65 F. 2d 112 (CA10 1933) and *Green River* v. *Bunger*, 58 P. 2d 456 (Wyo. 1936), appeal dismissed for want of a federal question, 300 U. S. 638 (1937).

absolute. The rights of others must be considered. 341 U. S., at 642. In each case, the Court approaches the activity in question as a protected First Amendment activity, but with a commercial aspect to it which subjects it to *reasonable* regulation and taxation. Compare *Murdock*, *supra*, 319 U. S., at 114 ("It [the tax] is in no way apportioned.") with *Swaggart Ministries* v. *Cal. Bd. of Equalization*, 493 U. S. 378, 389 (1990) (percentage sales tax on Bibles, etc., constitutional); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 21 (1989) (plurality) ("unnecessary sweeping statements in *Murdock*" disavowed).

Breard is not distinguishable from *Murdock* on the ground that subscription magazines are different from charitable donations in any way relevant to the First Amendment question. As discussed above, the rationale *Murdock* itself precludes such a distinction. The cases are distinguishable in that the regulation in *Breard* was deemed reasonable, notwithstanding the protected status of the publications, while the tax in *Murdock* was not. See *Texas Monthly*, *supra*, 489 U. S., at 23, n. 10. If *Murdock* is read more broadly to create a right to solicit free of reasonable regulation or taxation, then it is to that extent overruled by *Breard*, *Texas Monthly*, and *Swaggart*.

Breard distinguishes *Martin* v. *Struthers* by emphasizing that *Martin* involved only the *free* distribution of literature. *Breard*, 341 U. S., at 642-643. Yet *Martin* was decided the same day as *Murdock*, and *Murdock* saw no significant difference between the sale of a publication and the distribution combined with solicitation of a donation. See 319 U. S., at 111. The difference between *Breard* and *Martin* is the *manner* of solicitation. Martin simply left leaflets with people advising them of a meeting. 319 U. S., at 142. Breard employed "possibly persistent solicitor[s]," 341 U. S., at 644, who confronted people in their homes, asking them to make an immediate change in legal position, *i.e.* contracting to purchase magazines. Notwithstanding the constitutional guarantee of freedom of press, the city had the power to protect people from

such confrontations. That, *amicus* submits, is the true distinction between *Martin* and *Breard*.

Breard confirms what *Cantwell* said 11 years earlier. A "State may by general and non-discriminatory legislation regulate the times, the places, *and the manner of soliciting* upon its streets . . . ." *Cantwell*, *supra*, 310 U. S., at 304. The prohibition on door-to-door sales in *Breard* was a reasonable regulation of the *manner* of solicitation, justified by the interest of residents in avoiding "the annoyances of house-to-house canvassing." 341 U. S., at 644. The annoyance caused by salesmen is greater than that caused by people distributing handbills. The ban on door-to-door selling was therefore upheld in *Breard*, while prohibitions on free distribution of literature in *Lovell* and *Martin* were struck down.

B. The Schaumburg Case.

Schaumburg v. *Citizens for a Better Environment*, 444 U. S. 620 (1980) dealt with a discriminatory prior restraint. Charities were required to obtain a permit before soliciting. *Id.*, at 623-624. Some charities would be issued the permit and some would not. Those that spent more than 75% of the proceeds for salaries and administrative expenses would not be issued the permit. *Id.*, at 624.

Schaumburg reviewed the history described above to answer the contention that solicitation was completely unprotected. See *id.*, at 628. After reviewing the history, *Schaumburg* concluded that charitable solicitation "has not been dealt with in our cases as a variety of *purely* commercial speech." *Id.*, at 632 (emphasis added).

This conclusion is fully consistent with the statements in *Cantwell* and *Breard* that solicitation, whether for a charity or a magazine, remains subject to reasonable regulation. Unfortunately, in discussing *Breard*, *Schaumburg* dwells on the fact that charitable solicitation was not involved in that case. 444 U. S., at 631-632. As explained

ante, at 12-14, that is not the true distinction between *Breard* on the one hand and *Murdock* and *Martin* on the other.

On its facts, *Schaumburg* is straightforward. The 75% requirement operated as a form of censorship. One medium of communication, door-to-door solicitation, was open to proponents of some causes but denied to those deemed less worthy by the government. The connection between the 75% requirement and the prevention of fraud was too tenuous to justify such a regulation. *Id.*, at 636-637. There was no connection at all between the 75% requirement and the protection of residential privacy and safety. These interests are invaded to the same degree by any solicitor. *Id.*, at 638.

Schaumburg thus plowed no new ground on the status of solicitation. After *Schaumburg*, as before, charitable solicitation is within the protection of the First Amendment but subject to some regulation. The ordinance in *Schaumburg* was simply held to be beyond the bounds of permissible regulation. *Schaumburg* did not need to discuss time, place, and manner regulations in any depth, because the portions of the ordinance which imposed those kinds of restrictions were not at issue. See *id.*, at 622, n. 1, 639.

In part IV, we will explain why the Port Authority's prohibition on the "solicitation *and* collection of funds" is constitutionally permissible, both as a regulation of conduct and as a time, place, and manner restriction. First, though, we will explain in part III why the government has a strong interest in regulating in-person solicitation for immediate payment of money.

III. The government has substantial interests in restricting uninvited personal solicitation for the immediate payment of money.

Much of the confusion in this area results from a failure to distinguish between solicitation in general and a personal solicitation in which the target is asked to make an immediate payment of money or some other change in legal position. The difference was recognized in *Thomas* v. *Collins*, 323 U. S. 516, 540 (1945). It is central to the "reasonableness" determination of the plurality in *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 586, 110 S. Ct. 3115, 3123 (1990), and it is the cornerstone of the *Kokinda* concurrence, *id.*, 111 L. Ed. 2d, at 589, 110 S. Ct., at 3125 (Kennedy, J.).

The state has significant interests in the prevention of fraud and the prevention of duress. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940). As example of the kinds of problems solicitation can involve, we refer to the facts determined by the District Court in *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980). We do not cite them as the record in this case or imply that the Krishna Society has engaged in similar frauds in the Port Authority's airports. We cite them as "published material containing facts which bear upon the reasonableness of legislation." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 565 (6th ed. 1986). These past abuses would be equally relevant to the reasonableness of the regulation if they had been perpetrated by an entirely unrelated organization. They are relevant regardless of whether any solicitors are presently perpetrating them in the airports. Government interest is not limited to locking the barn door after the horse is stolen.

The Krishna Society's practices in *Barber* contrast sharply with those of the Jehovah's Witnesses in *Cantwell*. The latter were considered obnoxious precisely *because* they pushed their intolerant beliefs so vigorously. 310

U. S., at 301. A principal complaint in *Barber* was that the solicitors *concealed* their religious affiliation. 506 F. Supp., at 158-159. Rather than spreading their Word, they falsely or misleadingly told targets that the money was for "worldwide education and food distribution programs or children's drug programs," *id.*, at 159, or "starving children," *id.*, at 161. Items to be given away or sold were intentionally chosen and marked to conceal the solicitor's Krishna affiliation. *Id.*, at 162. The cryptic acronym "ISKCON" was used as a part of this effort. *Id.*, at 161.

Nor was misrepresentation the only form of fraud. The solicitors intentionally miscounted change. They folded over bills to shortchange people. *Id.*, at 160. They even stooped to targeting the mentally retarded. *Id.*, at 161.

In addition to fraud, the Krishna Society practiced various forms of duress. Some were subtle, some were not. Couples with young children were targeted. They were considered "easy marks because they cannot afford to divert their attention for very long from watching the children. Thus, the persistent Krishna solicitor can be relatively assured of a contribution, just so he will go away and let the couple go about their business." *Id.*, at 161. A related technique was to intentionally hold bills for a long time, pretending to make change, until the target was too tired or distracted to insist on the amount of change the solicitor had agreed to give. *Id.*, at 159, 163. Solicitors with less imagination simply disappeared into the crowd with the change, in one case taken from a young woman afflicted with cerebral palsy. *Id.*, at 161.

The District Court in *Barber* found that regulation of in-person solicitation was necessary "to combat widespread fraud *that cannot be effectively checked by the criminal*

justice system." *Id.*, at 169 (emphasis added).[6] Theft of small amounts by oral misrepresentation, shortchanging, or subtle duress is extremely difficult to prove beyond a reasonable doubt. Any criminal prosecution would involve an expenditure of the victim's time worth far more than the amount taken. This is especially so in an airport, where the victim is probably from out of town. Indeed, unscrupulous solicitors probably select airports and state fairs for precisely this reason.[7]

Many sources have recognized the special problems of personal solicitation for immediate payment or other change of legal position. *Breard* v. *Alexandria*, 341 U. S. 622, 644 (1951) noted the problem of the "persistent solicitor." The Federal Trade Commission has for 20 years held that it is "an unfair and deceptive act" to make a door-to-door sale without a three-day "cooling off" period for the buyer to change his mind. 16 C.F.R. § 429.1 (1991).[8]

The Postal Service came to a similar conclusion, and the *Kokinda* plurality quoted its findings with approval.

> " 'Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection

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6. The Court of Appeals reversed, 650 F. 2d 430 (CA2 1981), but substantially the same regulation was ultimately upheld in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981).

7. In addition to fraud and duress, people also have an interest in not being, to use the vernacular, "hassled." This interest might not by itself be sufficient, and the Krishna Society therefore attempts to portray it as the only interest involved. See Petition for Writ of Certiorari, Question 3. In addition to the other interests, *amicus* submits, the "hassle factor" weighs in the balance as a government interest.

8. "Door-to-door" is not limited to in-home sales for this purpose. It would include sales on the street. *Id.*, Note 1(a).

> usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor.' " *United States* v. *Kokinda*, 111 L. Ed. 2d 571, 585, 110 S. Ct. 3115, 3123 (1990) (quoting 43 Fed. Reg. 38824 (1978)).

Justice Kennedy cites with approval a similar ban promulgated by the National Park Service for the District of Columbia Mall and other parks. 111 L. Ed. 2d, at 589-590, 110 S. Ct., at 3126 (concurrence). These parks are public forums. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 303, n. 2 (1984) (Marshall, J., dissenting).

Both *Kokinda* and *Heffron* approved regulations which banned or restricted in-person solicitation for immediate payment in places where other forms of expressions were freely allowed. *Heffron* was unanimous on this point. 452 U. S., at 654; *id.*, at 657 (Brennan, J., concurring in part); *id.*, at 663 (Blackmun, J., concurring in part). "[I]n-person solicitation deserves different treatment from alternative forms of solicitation and expression." *Kokinda*, 111 L. Ed. 2d, at 589; 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment).

A civilized society must make its rules without forgetting its most vulnerable members. To the seasoned, sophisticated "frequent flyer," airport solicitation may be only a delay, an obstruction, and a nuisance.[9] To the inexperienced, the naïve, the frail, the frightened, the harried, or the physically or mentally impaired, it can be much worse.

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9. Petitioners' contention that airport solicitation is "accepted practice," Pet. Brief 19, is overstated. It would be more accurate to say that veteran travelers are resigned to it because they believe nothing can be done.

IV. The state may constitutionally ban such solicitation in the airport, regardless of whether it is a public forum.

The regulation at issue in this case is Airport Rules and Regulations, the Port Authority of New York and New Jersey, Chapter III, which reads in part as follows (emphasis added):

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> "1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> * * *
>
> "(b) The sale *or* distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> "(c) The solicitation *and* receipt of funds."

The use of the conjunctive in paragraph (c) implies that pure solicitation not accompanied by receipt would be permitted. That is, a person who wished to explain his cause to passers-by and ask them to make a donation later, such as by mailing it in or by placing it in a collection box located somewhere else, would be permitted to do so. Such a regulation, *amicus* submits, is precisely the kind which this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940) assured the nation would be permitted. Paragraph (c) is valid regardless of whether the airport is a public forum.

A. Conduct.

Collecting funds is conduct, and conduct is subject to regulation, even when it is intertwined with advocacy. *Thomas* v. *Collins*, 323 U. S. 516, 540 (1945). The traditional test for regulation of "expressive conduct" is the four-part test of *United States* v. *O'Brien*, 391 U. S. 367 (1968), the draft-card burning case. The *O'Brien* test applies "when 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . ." *Id.*, at 376. In such cases,

> "a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377 (numbers added).

The first point is rarely a problem. It refers to limitations on government other than the First Amendment, because otherwise the analysis would become circular. *O'Brien* simply noted that the draft was within one of the enumerated powers of Congress. *Ibid.* The second part, government interest, is discussed in part III, *ante*.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943) and *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980), solicitation was held to be within the category of noncommercial speech only because of its connection within the religious and environmental messages of the respective groups. The "free expression" in the third part of *O'Brien* must therefore refer to the message of the cause and not to solicitation itself.

The Port Authority's across-the-board ban on solicitation and receipt of funds meets the third part of the test.

It applies equally to the Krishna Society and the Airline Passengers' Association. It is not being applied because of disagreement with the message presented. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 295 (1984). The regulation differs sharply from the statutes in *Texas* v. *Johnson*, 491 U. S. 397 (1989) (flag burning) and *Stromberg* v. *California*, 283 U. S. 359 (1931) (display of red flag) which prohibit conduct typically only engaged in by people of a disfavored viewpoint. Unlike the discretionary permit cases, see *ante*, at 7-9, and percentage-test cases,[10] this regulation has no potential for favoring one viewpoint over another.

For the fourth part of the *O'Brien* test, the word "essential" must be read in the context of the facts and holding of the case. No one could seriously contend that a prohibition on draft-card burning was "essential" to the draft in the sense that the Selective Service System would collapse without it. It was enough that the continuing availability of the cards "substantially furthers" the functioning of the system and that "no alternative means . . . would more precisely and narrowly assure" that availability. 391 U. S., at 381.

The meaning of the fourth part of *O'Brien* is further illustrated by *Clark* v. *Community for Creative Non-Violence*, *supra*. The Court of Appeals had held that a ban on camping in Lafayette Park (the quintessential public forum) was "unnecessary and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest. . . ." 468 U. S., at 299. This Court reversed, holding that the Court of Appeals' suggested alternatives "represent no more than a disagreement with the Park Service over how much protection the core parks require *or how an acceptable level of preservation is to be attained*." *Ibid.* (emphasis added). See also *post*, at 26 ("narrow tailoring").

10. *Schaumburg*, *supra*; *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988).

Fraud and extortion can, of course, be criminally punished. Yet the victim who is falsely told the money is going for starving children, see *ante*, at 17, may never know that it does not. The mentally retarded target will also never know. The person who is sold a record in JFK Airport will not know he has been cheated until he gets home to Tucson and plays it. Only then would he discover that it contains a Krishna song and not a performance by Stevie Wonder, as he had been intentionally led to believe. See *Barber*, *supra*, 506 F. Supp., at 162. It is unlikely he will return to New York to press charges. The person who gives a dollar to get a persistent solicitor to stop blocking his path or stop following him with repeated entreaties will likely not want to testify in a criminal case. The elderly woman who feels physically intimidated, though no overt threat is made, will probably be unable to state a case for a criminal prosecution.

In-person solicitation for the immediate payment of money is therefore fraught with potential for widespread but low-level crime. The only legitimate donation is one given by a person who understands the nature of the cause and genuinely wishes to support that cause. When a person gives because of misrepresentation of the cause, because giving is the easiest way to be allowed to proceed in peace, or because of fear, that person has been cheated or robbed.

The Port Authority has decided that a nondiscriminatory ban on repetitive solicitation and receipt of funds is necessary. The Krishna Society, like the Community for Creative Non-Violence, simply asks this Court to disagree. The answer should be the same.

B. Time, Place, and Manner.

A limit on expressive conduct is valid if it passes the *O'Brien* test even if it is an outright prohibition rather than a mere time, place, or manner regulation. Conversely, a time, place, or manner regulation is valid if it passes the test for such regulations, even if it regulates "pure speech" rather than expressive conduct. It follows, then, that a regulation of the time, place, or manner of expressive conduct need only pass one test or the other to be valid. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298, n. 8 (1984). In practice, though, most regulations will pass both tests or neither, because the two tests are "in the last analysis . . . little, if any, different. . . ." *Id.*, at 298.

The regulation in this case, like the one in *Kokinda*, restricts the manner of solicitation. The Port Authority allows speech generally. See Pet. Brief 41. Nothing stops the Krishna Society's members from explaining their religion and asking people to make a donation at some other time and place. The least intrusive way to collect donations is for donors to mail them in.[11] Alternatively, the Port Authority would permit the Society to collect donations on the sidewalk outside the airport. See *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F. 2d 576, 578, n. 2 (CA2 1991). For donations too small to justify postage, departing passengers, having been informed inside of the purpose of the collection, could leave them with a collector on the sidewalk.

These *manners* of solicitation differ from the manner involved in *Kokinda* and the present case in that they give the potential donor a "cooling off" period, similar to the one required by the FTC for door-to-door sales. See *ante*, at 18. Away from the "eager gaze of the solicitor," the potential donor can better reflect whether he really has

11. *Amicus* CLF collects *all* of its "grass roots" donations in this manner.

sufficient information about this ostensible charity, or whether his funds would do more good elsewhere.

"[R]estrictions of this kind are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant government interest, and [3] that they leave open ample alternative channels of communication of the information." *Clark*, *supra*, 468 U. S., at 293 (numbers added).

The first part of this test (the "TPM test," for brevity) is essentially the same as the third part of *O'Brien*. Discrimination between viewpoints is the cardinal First Amendment sin. A restriction passes muster if its "applies evenhandedly to all," and is not a "means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The Krishna Society's chosen medium, not its message, is the basis of this regulation.

On this point, *Heffron* is dispositive. A nondiscriminatory restriction on all would-be solicitors is content-neutral. 452 U. S., at 648-649; see also *Kokinda*, *supra*, 111 L. Ed. 2d, 587-588, 110 S. Ct., at 3124-3125 (plurality); *id.*, 111 L. Ed. 2d, at 590, 110 S. Ct., at 3126 (Kennedy, J., concurring in the judgment). *Heffron* also noted that a restriction which "prefers listener-initiated exchanges to those originating with the speaker" is both content-neutral and within the realm of time, place, and manner regulation. 452 U. S., at 649, n. 12. A separation of advocacy from collection is no more restrictive, and probably less so.

The second part of the TPM test, narrow tailoring, is essentially the same as the fourth part of *O'Brien*. This regulation passes the test for the reasons discussed *ante*, at 22-23.

Ward, *supra*, sheds further light on this part of the TPM test. *Ward* flatly rejected the contention that the regulation must be the least restrictive means to be valid. 491 U. S., at 798. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.*, at 799. *Clark*, *supra*, applies the requirement by saying "if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out." 468 U. S., at 297. The regulation here clearly makes passengers less exposed to fraud and duress than they would be without the regulation.

"The final requirement, that the guideline leave open ample alternative channels of communication, is easily met." *Ward*, *supra*, 491 U. S., at 802. It is easily met in this case as well. As we described at the beginning of this part, *ante*, at 24, the Krishna Society is free to explain its religion to travelers, if that is what it wishes to do. It is free to encourage legitimate donations by mail or on the sidewalk.

The only thing it is not free to do (as far as paragraph (c) of the regulation is concerned) is collect donations "under the eager gaze of the solicitor." That method of collection is most efficient for *precisely* the reason the state has a strong interest in forbidding it. This manner of solicitation collects money from people who would not contribute if they thought it over and decided in private. The First Amendment does not guarantee maximum revenue. See *Swaggart Ministries* v. *Cal. Bd. of Equalization*, 493 U. S. 378, 391 (1990).

The regulation prohibiting solicitation and receipt funds is valid if it meets either the *O'Brien* test or the time, place, and manner test. It meets both.

CONCLUSION

The judgment of the Court of Appeals, insofar as it upholds the solicitation regulation, should be affirmed.

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